

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

TX 1997-000075

12/03/2002

HON. PAUL A KATZ

CLERK OF THE COURT
B. Navarro
Deputy

FILED: 12/11/2002

HELEN H LADEWIG

PAUL V BONN

v.

ARIZONA DEPT OF REVENUE

MICHAEL F KEMPNER

EUGENE O DUFFY PHV
ONEIL CANNON & HOLLMAN, SC
STE 1400 111 W WISCONSIN AVE
MILAUKEE WI 53202-4803

UNDER ADVISEMENT RULING

The Court having taken Plaintiffs Estate of Helen H. Ladewig, et al. ("Taxpayers"), Combined Motion for an Order Determining the Department's Lack of Standing to Contest Class Counsel's Common Fund Attorneys' Fee Award and Motion In Limine under advisement; having reviewed the memoranda of the parties and legal authorities cited therein; and good cause appearing,

IT IS ORDERED denying Taxpayers' Motion for an Order Determining the Department's Lack of Standing, finding that the Arizona Department of Revenue ("Department") has standing to contest class counsel's common fund attorneys' fee award as between the 9% and 12% range agreed to by the parties in their settlement agreement, and denying their Motion in Limine precluding the Department from offering evidence or argument on that Motion.

Both the class attorneys and the Department stipulated in their settlement agreement to permit the Department to participate in a hearing to determine an award of attorneys' fees and argue that the fee award should be toward the lower end of the 9% to 12% range recommended by the mediator. Class counsel for Taxpayers now challenges the Department's participation in that hearing. Class counsel cites *Kerr v. Killian (Kerr III)*, 197 Ariz. 213 (App. 2000) as controlling authority for their proposition that the Department has no standing to challenge a common fund award of attorneys' fees.

In *Kerr III*, the trial court granted partial summary judgment in favor of the taxpayers and awarded class counsel 20% of the award under the common fund doctrine for attorneys' fees.

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The Department appealed the common fund award by the trial court citing that the trial court's procedure in arriving at the award violated the due process of the non-party taxpayers. The appellate court held that the Department did not have standing to appeal the common fund award of attorneys' fees. In *Kerr III*, the Department attempted to assert the constitutional rights of a third party, the taxpayers. The Department may do so only if it as the litigant 1) has a substantial relationship to the third person, 2) the third person is unable to assert the constitutional rights on his or her own behalf, and 3) failing to grant the litigant standing would dilute the third person's constitutional rights. *Kerr III*, quoting *State v. B Bar Enterprises, Inc.*, 133 Ariz. 99, 101 n.2 (1982). The *Kerr III* Court found that the Department met none of these requirements.

Kerr III is clearly distinguishable from the instant case. First, the Department is not challenging an award under the common fund doctrine. The Department, by signing the stipulated settlement agreement, agreed that a common fund award is appropriate. Second, this matter is still in the trial court. The Department is not asserting the rights of the taxpayers on an appeal. In *Kerr III*, the Tax Court ordered that notice of the hearing to determine attorneys' fees be given to all of the taxpayers entitled to a refund. Several non-party taxpayers addressed the Court at the hearing. *Kerr III* at 217. The opinion states that the Department did not contest the testimony of the taxpayers' experts that the fee award was reasonable. *Kerr III* at 216, 220. These references imply to this Court that both the taxpayers and the Department were permitted to appear and participate at the hearing in which the fee determination was made. The Department was permitted to present evidence and challenge class counsel's position as to the reasonableness of the fee. That is what the Department is seeking to do here and this Court sees no reason to disallow that. Neither the taxpayers nor their counsel in their appeal in *Kerr III* appears to have challenged the participation of the Department at that hearing, nor did the Court of Appeals find the Department's participation to be improper. The Court simply held that the Department did not have standing to appeal the common fund issue on behalf of the taxpayers. That is not the situation here.

The class attorneys claim that the Department is once again attempting to assert the rights of the taxpayers by arguing that the attorneys' fees should be awarded at the lower of the 9% to 12% range approved by the mediator. They argue that not only does the Department not have standing, it is improperly attempting to cause conflict between the taxpayers, their lawyers, and the Department. They argue that the Department cannot now take a position contrary to that which they held throughout this litigation, in essence refusing to make payment to the taxpayers, and now attempt to litigate on their behalf to reduce the attorney fee award. Such a position is contrary to both their prior position and possible future position should there be disagreement as to future payments. Class attorneys claim this causes conflict which is improper pursuant to Rule 42, Rules of the Arizona Supreme Court, E.R. 1.7, *et seq.* (conflicts of interest); E.R. 2.1 (independent professional judgment); E.R. 5.4 (professional independence); E.R. 8.4 (conduct prejudicial to the administration of justice). Clearly, permitting the Department to participate in the attorney fee hearing could benefit the taxpayers. Should the Department persuade this Court to award class counsel a fee of 9% rather than 12%, more money would remain in the common

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fund for payment to the taxpayers. However, this Court does not believe that there is a conflict of interest or that the Department is attempting to assert the due process rights of the taxpayers.

In this case, although the refund monies come from Arizona's General Fund, the Department is responsible for all phases of the administration and distribution of this mass refund including issuing the notices to the taxpayers, administering the funds, keeping an accounting, and paying the attorney fees. This Court does not see the Department's motive in participating in the attorney fee hearing as representing the interest of the taxpayers, or as a means to cause strife or conflict as between the taxpayers and their counsel, or as a form of retribution, malice, or spite. The Department clearly has a fiduciary and statutory duty to ensure the collection of taxes due and owing to the State of Arizona and to ensure the credit or return of monies to those taxpayers that have paid more than their fair share under the law. See A.R.S. § 42-1001 et seq. These duties exist irrespective of any litigation. The Department's participation in the attorneys' fee hearing enables it to fulfill its fiduciary and statutory duties to ensure that the Department refunds fully the monies to the taxpayers who have wrongfully paid income taxes on out-of-state corporate dividends. There is a question as to how much of a refund should be made available and/or distributed to the taxpayers. The parties have agreed that a formula is the best way to allocate these funds. However, the actual amount returned to each taxpayer depends, in part, upon how much money is available for allocation. The attorneys' fees awarded by this Court may affect how much the Department will refund to the taxpayers in fulfillment of its fiduciary and statutory duties. This Court believes that the Department has standing to present its position as to why more money should remain in the common fund for distribution to the taxpayers, and thus, why the class attorneys should receive the lower of the 9% to 12% range of the common fund monies.